BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RAUL R. MENDOZA	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,052,221
NEODESHA PLASTICS, INC.	)	
Respondent	)	
AND	)	
	)	
LM INSURANCE CORPORATION	)	
Insurance Carrier	)	

ORDER

Respondent appeals from the preliminary hearing Order of Administrative Law Judge Thomas Klein dated December 17, 2010, wherein the Administrative Law Judge determined that the claimant has met the standards for an appropriate timely written claim and ordered the respondent to provide a list of three physicians from which the claimant is to choose an authorized treating physician. The Order states as follows:

> The court finds that the employment physical that discovered Claimant's hernia is sufficient notice to the Respondent of a work accident. The court further finds preliminarily that the Claimant has met the standards for an appropriate timely written claim. The Court orders the Respondent to provide a list of three phys[i]cians from which Claimant is to choose an authorized treating physician.[1]

ISSUES

(1) What is claimant's date of accident?

(2) Did the Administrative Law Judge err by determining the claimant gave timely notice of his injury to his employer pursuant to K.S.A. 44-520 and made timely claim pursuant to the provisions of K.S.A. 44-520a?

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[1] ALJ Order (Dec. 17, 2010).

(3) Did the Administrative Law Judge err by implying the claimant met with personal injury that arose out of and in the course of his employment with respondent?

(4) Did the Administrative Law Judge exceed his jurisdiction in granting claimant's request for relief at the preliminary hearing, which included a request for authorized medical care for his hernia?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented, the undersigned Board Member makes the following findings of fact and conclusions of law:

On September 11, 2009, claimant went to work for Neodesha Plastics. He was a puller, trimmer and mold setter. This entailed maneuvering a mold into place that weighed anywhere from 100 pounds to 700 pounds. The mold was lifted with a chain hoist, but sometimes a chain would not go around a mold and it would have to be lifted by hand.[2] This was corroborated by a supervisor, Clint Bischoff, who testified the claimant would use a hoist to change tools that weighed ". . . 3, 4 or 500 pounds."[3] Diane Lambert, director of human resources, and Clint Bischoff, the claimant's supervisor and production manager, testified the claimant's primary duties were to remove parts weighing two or three pounds from a machine. Mr. Bischoff also testified the claimant would occasionally move pallets that weighed 25 pounds, but later stated he did not know the actual weight of the pallets.[4] Mr. Bischoff stated another duty of the claimant was to place empty boxes on the pallets and fill them with scraps.

Claimant filed an Application for Hearing on August 26, 2010, alleging a hernia injury arising out of a single accident on March 5, 2010. August 26, 2010, is within 200 days after March 5, 2010, as required by K.S.A. 44-520a. On October 15, 2010, claimant filed an amended Application for Hearing alleging the hernia was caused by series of microtraumas through June 18, 2010.

After the claimant began work for the employer, it was discovered by Diane Lambert, human resources director, that claimant had not undergone a pre-employment physical. She personally took the claimant to see Dr. Bradley H. Barrett for a physical on March 5, 2010.

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[2] P.H. Trans. at 6-7.

[3] *Id.*, at 32.

[4] *Id.*, at 37-39.

During the physical, Dr. Barrett discovered a "small but definite right inguinal hernia."[5] The claimant complained to Dr. Barrett that "sometimes his right groin does hurt with lifting over and over . . ."[6] but Dr. Barrett was uncertain whether that was the hernia or simply abdominal muscle discomfort. The doctor limited the claimant's lifting to 25 pounds. When the claimant got into Ms. Lambert's vehicle, she asked him how the appointment went and the claimant showed her written restrictions from Dr. Barrett.

> Q. (Mr. Wimmer) And Dr. Barrett indicated that he [claimant] had a hernia; is that correct?
>
> A. (Ms. Lambert) Yes.
>
> Q. All right. Did you ask Mr. Mendoza [claimant] in March 2010 what he attributed the hernia to?
>
> A. Well, no. When he got in the car -- because I didn't talk to Dr. Barrett that day -- he got in the car and I asked him, 'So how did it go?' He handed me the restrictions and I read it and it said he had a hernia. And I said, 'Oh, you had pain before. This is the first we have heard about it.' And he said, 'Oh, sometimes I feel pain, but I just take some aspirin and it's okay.' And I said, 'Well, this says you can't lift over 25 pounds and so you need to make sure that you're not lifting because we write people up if they lift over their restricted amount or if they do anything against restrictions.'[7]

The claimant returned to work. At the November 30, 2010, preliminary hearing claimant indicated that he was placed on light duties for a week and then went back to his regular duties. According to Mr. Bischoff claimant did not mention any abdominal problems and did not indicate to Mr. Bischoff that he had a work injury. However, claimant testified that after he returned to regular duties, his abdominal pains got worse. On June 18, 2010, the claimant was laid off because orders decreased and there was a lack of work.

Claimant's attorney sent claimant to Dr. Pedro A. Murati on November 9, 2010, for an independent medical evaluation. Dr. Murati diagnosed the claimant with a right inguinal hernia and opined that claimant's hernia was ". . . a direct result from the work-related injury that occurred on a series of accidents through 06-18-2010, during his employment with Neodesha Plastics."[8] He also recommended a hernia repair evaluation.[9]

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[5] *Id.*, Cl. Ex. 2.

[6] *Id.*

[7] *Id.*, at 20-21.

[8] *Id.*, Cl. Ex. 1.

[9] *Id.*

The date of claimant's accident must first be established. Date of accident is not an issue that the Board has jurisdiction to decide on an appeal from a preliminary hearing order unless a finding is necessary in order to determine whether claimant suffered accidental injury arising out of and in the course of employment, or if notice and/or written claim was timely made.[10]

Claimant alleges in his brief the date of accident is March 5, 2010, the date of his physical, or in the alternative, August 25, 2010, which is the date claimant's attorney notified the employer of claimant's injury.[11] Respondent denies claimant was injured arising out of and in the course of his employment, but indicates if claimant was injured, it occurred between January and March of 2010.[12] The claimant indicated that he began having problems with his abdomen prior to seeing Dr. Barrett[13] and thought it began a month and a half before the doctor gave him the physical.[14] Claimant testified that the hernia came over a period of time from lifting and the work he was doing.[15]

When a claim involves a series of repetitive microtraumas, the date of accident is determined by K.S.A. 2009 Supp. 44-508(d):

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

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[10] *Cluck v. Atchison Casting Corp.*, Nos. 204,983 & 265,534, 2002 WL 31602542 (Kan. WCAB Oct. 24, 2002).

[11] Claimant's Brief at 6-7 (filed Jan. 28, 2011).

[12] Respondent's Brief at 3 (filed Jan. 11, 2011).

[13] P.H. Trans. at 12.

[14] *Id.*, at 16-17.

[15] *Id.*, at 17-18.

This Board Member finds the testimony of claimant combined with the report of Dr. Barrett clearly proves claimant suffered a repetitive injury. Dr. Barrett was authorized by the employer and Dr. Barrett gave claimant work restrictions. Thus, pursuant to K.S.A. 2009 Supp. 44-508(d) claimant's date of accident is March 5, 2010.

Before determining if the claimant's injury arose out of and in the course of his employment the issue of timely notice must be resolved.

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. . . .[16]

In the present case, Diane Lambert, an authorized agent of Neodesha Plastics, received timely notice of the accident on March 5, 2010. Ms. Lambert had documentation from Dr. Barrett regarding claimant's hernia and restrictions. This Board Member finds the claimant gave timely notice pursuant to K.S.A. 44-520.

The claimant also satisfied the requirement of giving timely written claim for compensation within the statutory 200-day period as required by K.S.A. 44-520a. It is the intent of the Legislature that the workers compensation act be liberally construed for the purpose of bringing employers and employees within the provisions of the act.[17] On August 26, 2010, which is within 200 days after March 5, 2010, claimant filed an Application for Hearing, which satisfies the requirement of timely written claim pursuant to K.S.A. 44-520a.

By ordering the respondent to provide a list of three physicians from which the claimant is to choose an authorized treating physician, the Administrative Law Judge implied the claimant's injury arose out of and in the course of his employment. Respondent argues the claimant failed to meet the burden of proving his injury arose out of and in the course of his employment. The claimant told Dr. Barrett his groin hurt when he lifted over and over again.[18] When Dr. Murati took the claimant's history, the claimant related he was lifting molds that weighed approximately 600 pounds into chains when he sustained the injury.[19] The claimant testified he would move molds in place with the help

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[16] K.S.A. 44-520.

[17] K.S.A. 2009 Supp. 44-501(g).

[18] P.H. Trans., Cl. Ex. 2.

[19] *Id.*, Cl. Ex. 1.

of a hoist and that the molds weighed from 100 pounds up to 600 or 700 pounds.[20] The testimony of the claimant is credible and consistent.

After the claimant's physical on March 5, 2010, he continued to suffer a series of repetitive injuries up until the date he was laid off for lack of work. The claimant was placed on light duty for a week, but then went back to his regular duties, which exceeded the 25-pound lifting restrictions imposed by Dr. Barrett. Thus, the implied decision of Judge Klein that the claimant's injury arose out of and in the course of his employment is supported by substantial, competent evidence.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[21] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[22]

WHEREFORE, the undersigned Board Member affirms the decision of Judge Klein. Respondent is ordered to provide claimant with a list of three physicians from which claimant may select one to provide medical treatment.

IT IS SO ORDERED.

Dated this ____ day of March, 2011.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Daniel S. Bell, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[20] *Id.*, at 6.

[21] K.S.A. 44-534a.

[22] K.S.A. 2010 Supp. 44-555c(k).